

Sales: False representations by seller: As to matters of law: Statement that alcoholic beverage could be legally sold

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practically any and all circumstances, and all this with very little of the usually accompanying legal red tape and expense.

B. C.

Sales: False representations by seller: As to matters of law: Statement that alcoholic beverage could be legally sold.—

And Noe, a husbandman, drinking of the wine, was made drunk, and was uncovered in his tent.

And Noe, awaking from the wine, when he learned what his younger son had done to him,

He said: Cursed be Chanaan!

Genesis, Chap. 9, Verses 20-25

Neither a new nor a novel application of the law respecting fraud was made in the recent case of *Ad. Dernehl and Sons Company v. Detert*, 186 Wis. 113, 202 N. W. 207. But it is worthy of comment as an illustration of the law's love for fictions and legal precedent. In this, an action for the value of goods purchased to be sold as a beverage and which contained an unlawful percentage of alcohol, a counterclaim for damages caused by defendant's arrest on the basis of representation by the plaintiff that it had special permission from the prohibition officers of the United States and Wisconsin to sell the goods to the defendant; that it had a copy of the law which permitted the sale of the same and that it knew the law permitted such sale to the defendant, was held demurrable, these being representations as to the law and not of fact, defendant being charged with knowledge of the law, and that though the matter of special permission was in the nature of fact, the defendant was charged with knowledge that such permission could not lawfully be given.

This case illustrates the general rule that in the absence of confidential relations a misrepresentation as to a matter of law is not a fraud, being considered as a mere statement of opinion.¹ *Gormely v. Gymnastic Association*, 55 Wis. 35, 13 N. W. 242, also a liquor case, governed the instant case on a similar state of facts. The fact that the Gormely case was a typical "cow case" made it difficult to consider and apply the exception to the general rule, i.e.,—where one has superior means of information, professes a knowledge of the law and thereby obtains an unconscionable advantage over another who has not been in a situation to become informed, the injured party is entitled to relief as well as if the representation had been made concerning a matter of fact.²

A wider application of this modification of the general rule would seem to be desirable in the present complex state of society where mutual trust and confidence are the very life of business and where it

¹ *Upton v. Tribilcock*, 91 U.S. 45; *Georgia Home Ins. Co. v. Worden*, 113 Ala. 409, 22 So. 288; *Platt v. Scott*, (Ind.) 6 Black, 389, 39 Am. Dec. 436; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357. See also, 68 Am. Dec. 376; 18 A.S.R. 559; 11 L.R.A. 197; 35 L.R.A. 420; 37 L.R.A. 605; Ann. Cas 1913B, 1143 *et seq.*

² *White v. Harrigan*, 77 Okl. 123, 186 Pac. 224; *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556 at p. 559. See also notes, 9 A.L.R. 1051 and 12 R.C.L. 296.

is usual for the merchant to look to his wholesaler or manufacturer for a true exposition of sales possibilities in every phase of the market.

It is to be noted that generally, false representations of foreign law form the basis for a fraud action.³ From the layman's viewpoint (and it is the layman for whom laws are designed) most of our present day law, being of a plethoric and joyous manufacture, might just as well be foreign so far as a realization of the time-worn legal fiction is concerned. What honest attorney pretends to know the law? "Eat, drink and be merry, for tomorrow we may die"—by statute.

There is nothing too intimate or too trivial to escape supervision and control under threat of fine or imprisonment, be it the sin of expectoration,⁴ or the common towel,⁵ or, as in New York, the length of bed sheets. Nothing in the heavens above, or the earth beneath or in the waters under the earth is safe from the ferret legislative eyes. The maxim that every man is supposed to know the law has ceased to be a legal fiction. Nobody does, nobody can, know the law or a thousandth part of it. By the time anybody gets to know one law there is another in its place or the gracious lords, its makers, have breathed into it an exception or a discretionary power conferred upon the state's sworn officers. To be safe, 'twere but fitting and proper that vendor and vendee at all sales have counsel in attendance to clutch to their sainted bosoms, title, and bear it safely and legally to its new owner rather than permit it to pass helpless and alone to the trustful vendee who persists, in the face of innumerable and fly-by-night statutes to believe in the inherent virtue of the commonwealth's citizenry. The law as stated in *White v. Harrigan*, 77 Okla. 123, 186 Pac. 224, *supra*, seems to have much merit as applied to fraud in sales, especially when new and weird statutes flutter uncertainly like bats in the legal twilight which always precedes the utter and familiar darkness of a judicial pronunciamiento.

No citizen could keep up with the laws and have time to earn a living. Legal fictions are but a handy salve for the judicial conscience. But it is not permitted so late in the season to cry "thumbs down" upon the law's beloved distinction in fraud between misrepresentation of fact and of law with the latter's fiction of knowledge, much as the general rule goes against the layman's sense of justice in this hey-day of free-for-all statute-making.

"We are, perforce, bound by the idiosyncratic decision of some irascible big-wig several hundred years gone by, which has kept on growing like a legal stalactite upon which our misfortune is to crystallize as the final drop." From the date of *Shadrach v. Abednego*, 91 Babylonian Reports 273, even unto the present generation of one-hundred proof dry virtue and *Ad. Dernehl and Sons Company v. Detert*, 186 Wis. 113, 202 N. W. 207, precedent has squelched originality so that now no lawyer, even if he has an idea, ever has the temerity to disclose the fact. The opinion of Chief Justice Father Time is sacrosanct. "Wherefore the law indeed is holy, and the commandment holy, and just and good." (Romans 7:12). In the path of this legal snowball, precedent that has

³ L.R.A. 1915A, p. 675.

⁴ Chap. 57 sec. 1418m, Wis. Stats., 1911.

⁵ Chap. 82 sec. 1727m, Wis. Stats., 1911.

come rolling down the years, it was useless for the defendant in the instant case to stand and howl out ignorance of Section 165.01. Statutes ch. 85. title II, sec. 3, Laws 66 Cong. His sweet, trustful nature could do naught but give ear unto the plaint of the apostle.

"And I lived some time without the law But when the commandment came, sin revived."

Romans, 7:9

J. P TAUGHER